IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 34

TIMES FILM CORPORATION, A NEW YORK CORPORATION,
Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION, RICHARD J. DALEY AND TIMOTHY J. O'CONNOR,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Preliminary.

We accept petitioner's summarization of the opinions below, the jurisdiction, the question presented, the statutes involved, and the statement. There is no area of disagreement in these matters and therefore it is unnecessary to repeat them.

SUMMARY OF ARGUMENT.

I.

Petitioner is attempting to compel an abstract opinion from this Court ruling on the validity of a municipal ordinance. There is no substantial federal question as peti-

tioner failed to make proper application for a permit which may well have been issued if petitioner had complied with the provisions of the ordinance. There is no justiciable controversy nor any real constitutional question. It is fundamental that this Court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to render a judgment to guide potential future litigation.

II.

Free speech is not absolute and is subject to some restriction. Matters dealing with obscenity and those tending to lead to riots or breaches of the peace have never been regarded as within the protective areas of constitutional guarantees against abridgment of free speech. These well-defined and narrowly limited classes of speech constitute exceptions to the general rule.

The several states and the municipalities may prohibit acts or things reasonably thought to bring evil or harm to its people. Obscene motion pictures publicly exhibited to children, the impressionable, and the weak minded of our society, cannot be tolerated. Where the obscene feature overcomes the artistic merit, and where it leads to prurient, lustful desires, then the municipality is duty-bound to protect its people from the dire consequences of such aroused desires.

The controls which a state may exercise over motion pictures is not the same as those allowable for newspapers and the like. Obscenity is not protected by the Constitution and we are convinced that the judiciary will not limit the local authorities in resorting to whatever means legally available to protect its people against the public exhibition of obscene films. Nor is it conceivable that the courts will permit free speech which leads to riots or breaches of the peace.

ARGUMENT.

I.

There is no justiciable controversy nor a substantial federal question.

The trial court and the United States Court of Appeals for the Seventh Circuit were both of the opinion that this case does not involve a justiciable controversy nor a substantial federal question (R. 27-30; 37-42). We are firmly convinced that this is true.

The court below stated (R. 38): "* * * plaintiff has limited its statement of the facts in an obvious attempt to so frame its case that" this Court will be prevailed upon to rule on the constitutional question. This Court has steadfastly adhered to the rule that where an ordinance requires the issuance of a permit as a condition precedent to the carrying on of a business, one who is within the terms of the ordinance, but who has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Smith* v. *Cahoon* (1931), 283 U. S. 553, 562; *Staub* v. *City of Baxley* (1958), 355 U. S. 313. However, in both the *Smith* and *Staub* cases, this Court recognized that this principal was inapplicable in criminal proceedings where the defendant had been subjected to arrest and was being prosecuted under such a law. This Court then held that any defense could be asserted in such proceedings. This is not the situation here. This is a civil proceeding, initiated by petitioner, seeking to compel the issuance of a permit. Petitioner has no standing in Court on constitutional grounds when it failed to make proper application for a permit.

II.

The Chicago Ordinance requiring advance showing of motion pictures prior to public exhibition is not violative of constitutional safeguards prohibiting restraints on Freedom of Speech and of the Press.

Petitioner attacks the validity of a Chicago ordinance which provides for public exhibition of motion pictures within the City. Under the terms of the ordinance, it is the duty of the appropriate municipal official to issue a permit for exhibition of a film unless he finds that the film is:

1. Obscene;
2. Immoral;
3. Portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy;
4. Tends to produce a breach of the peace or riots;
5. Purports to represent any hanging, lynching, or burning of a human being.

Petitioner refused to submit its film for examination. Having no knowledge of its contents, it necessarily follows that the motion picture meets every ground for rejection. Assuming, *arguendo,* that the picture, "Don Juan," is obscene, immoral, that it tends to produce a breach of the peace and riots, and that it violates all other provisions of the ordinance, we come to the basic question—does a municipality have such a right?

Illinois courts have consistently upheld the constitutionality of this very ordinance. *Block* v. *City of Chicago* (1909), 239 Ill. 251; 87 N. E. 1011; *United Artists Corp.* v. *Thompson* (1930), 339 Ill. 595, 171 N. E. 742; *American Civil Liberties Union* v. *City of Chicago* (1955), 3 Ill. 2d

334, 121 N. E. 2d 585. The findings of the Illinois courts are binding on the Federal Courts except in the limited area urged here, that is, whether or not the ordinance violates Freedoms of Speech and of the Press guaranteed under the First and Fourteenth Amendments.

For more than 50 years Chicago's censorship ordinance has been administered fairly and impartially without much criticism from the exhibitors. The standards therein set forth have been clearly understood and strictly adhered to by both the City's officials and the exhibitors. Rarely did the exhibitors find reason to criticize the decision of the City's Censorship Board. In those instances where disagreement did arise, the exhibitors found an adequate legal remedy in the state courts (*American Civil Liberties Union* v. *City of Chicago* (1955), 3 Ill. 2d 334, 121 N. E. 2d 585; *American Civil Liberties Union* v. *City of Chicago*, 13 Ill. App. 2d 278; 141 N. E. 2d 56). Until recent years, the exhibitors and the City's Censorship Board have lived in peaceful coexistence. It was not until recently, when the exhibitors, sensing a lowering of moral standards especially among the teenagers, began to produce "border line" motion pictures primarily based on sex and which, in the opinion of the City's Censorship Board tended to arouse the prurient interest, that the City's Censorship Board exercised its power of prior restraint. The result has been an avalanche of lawsuits testing the constitutionality of the City's Censorship Ordinance.

Petitioner contends that this Court has, in effect, already determined the ordinance provisions to be unconstitutional. We disagree vigorously with this position. We submit that this Court has never even hinted at its reaction to such procedures. In fact, this Court has pointedly refrained from taking a stand.

In *Burstyn* v. *Wilson* (1952), 343 U. S. 495, where this Court struck down a New York statute found defective due

to vagueness, the Court specifically rejected any misinterpretation of its holdings by saying (pp. 505, 506):

> "* * * it is not necessary for us to decide * * * whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us."

Petitioner also takes the stand that the landmark case of *Near* v. *Minnesota* (1931), 283 U. S. 697, supports its position. Of course, the *Near* case involved a Minnesota statute which empowered authorities to restrain future publications merely because prior publications had been found offensive. There, too, this Court carefully pointed out (p. 716):

> "* * * the primary requirements of decency may be enforced against obscene publications."

Despite the plethora of cases cited by petitioner, none sustain its argument, for no case yet decided has reached a conclusion on the facts here presented. Petitioner's authorities serve to sustain our position as well.

Kingsley Pictures Corp. v. *Regents* (1959), 360 U. S. 684 (*"Lady Chatterley's Lover"*), struck down a New York Statute which permitted rejection of a movie because it presented adultery in a favorable light. As in the *Burstyn* case, no question of obscenity was in issue.

Gelling v. *Texas* (1952), 343 U. S. 960, involved an ordinance which permitted rejection of motion pictures when the local Board was "of the opinion" that the motion picture was "of such character as to be prejudicial to the best interest of the people." This certainly established no standard or criterion.

Superior Films, Inc. v. *Dept. of Education* and *Commercial Pictures Corp.* v. *Regents* (1954), 346 U. S. 587, both involved a *per curiam* decision of this Court striking

down certain statutes on the basis of the *Burstyn* case. Examination of the decisions in the courts below (159 Ohio St. 315, 112 N. E. 2d 311; 305 N. Y. 336, 113 N. E. 2d 502), denotes faulty statutes from the viewpoint of clear, definite language.

Every other authority which petitioner relies upon has the same general objection. That is, the cases involve matters which are not decisive of the issue here. Many of petitioner's cases relate to freedom of religion and to prohibition of pamphlet distribution, no matter what was contained in the pamphlets.

We are confronted with a specific question. Does the City of Chicago have the right to require submission of motion pictures for inspection prior to public exhibition? And, if so, may the City of Chicago refuse a permit to publicly exhibit such motion pictures if the content is obscene?

Petitioner's remedy, if any, is found in the Due Procees Clause of the 14th Amendment. Under the decisions of this Court such Clause prohibits state laws which abridge freedom of speech or of the press. This Court held in the *Burstyn* case that the protective mantle of the 14th amendment extended to motion pictures (343 U. S. 495, 502).

Although the rights of free speech are fundamental, they are not in their nature absolute and their exercise is subject to restriction. *Whitney* v. *California* (1927), 274 U. S. 357, 373. Granted then that motion pictures are a form of speech contemplated by the First and Fourteenth Amendments, and that freedom of speech is not absolute, it remains only to determine what restrictions may be placed upon motion pictures in keeping with the general pronouncements of this Court. We know that there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

thought to raise any Constitutional problem. These include the obscene and those which tend to incite an immediate breach of the peace. *Chaplinsky* v. *New Hampshire* (1942), 315 U. S. 568, 571, 572; *Beauharnais* v. *Illinois* (1952), 343 U. S. 250, 255, 256. A breach of the peace includes not only violent acts, but acts and words likely to produce violence in others. *Cantwell* v. *Connecticut* (1940), 310 U. S. 296, 308. Thus the ordinance here being considered prohibits motion pictures which lead to a breach of the peace or riots. It would be a sad commentary, indeed, if Chicago, or any municipality, were powerless to prohibit films leading to such disastrous results. Free speech certainly is not all-encompassing. There are those who advocate public exhibition of the motion picture, with subsequent punishment for the exhibitor after the riots occur. We reject such a contingency. Nor do we believe that we must allow the public exhibition of an obscene movie pending criminal proceedings against the exhibitor. We believe that the municipality must have the right to act in the best interests of its people, and that such action is not an infringement of the constitutional freedoms implicit in the First and Fourteenth Amendments.

It is universally recognized, and this Court has so said, that a state or city may prohibit acts or things reasonably thought to bring evil or harm to its people. *Kovacs* v. *Cooper* (1949), 336 U. S. 77, 83. We know from refusal to submit that the motion picture is obscene, that it would cause breaches of the peace and riots and that it offends in every particular spelled out in the ordinance. Must the City sit by and let these events take place? Is there some Constitutional requirement that prevents the City from prohibiting motion pictures "reasonably thought to bring evil or harm to its people?" We are assured that the Constitution contains no such requirement. We are certain that to so hold would distort the Constitution, not sustain it.

Movies, like television, cannot be placed in the same category with newspapers, books, magazines, and the like. The appeal of the motion picture to the young and innocent, to the susceptible, and to the potential killer, rapist or armed robber, require some kind of governmental protection. In *Kingsley* this Court said that it was not there required to (360 U. S. 84, 689, 690):

> "* * * determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for newspapers, books, or individual speech."

Now, however, this Court is called upon to determine whether they are coextensive. We contend there is a vast difference. We agree with petitioner that the time has come for the Court to resolve this perplexing problem which has so confounded the several states and numerous municipalities since this Court's decision in the *Burstyn* case. The diverse interpretations which have stemmed from that case demand clarification and guidance.

In *Roth* v. *United States* (*Alberts* v. *California*), 354 U. S. 476 (1957), this Court stated that for the first time the question of whether obscenity was within the area of protected speech and press was squarely presented to the Court (p. 481), and concluded (p. 485):

> "*We hold that obscenity is not within the area of constitutionally protected speech or press.*" (Emphasis supplied.)

Having so held, we must now determine whether or not a City may prohibit the public exhibition of an obscene movie. Petitioner says that to do so is unconstitutional. Petitioner further argues that it should be permitted to continue the public exhibition of an obscene movie pending the prosecution of a criminal proceeding against it. This, of

course, is to give petitioner everything it wants. For movies are temporary things, of interest to the general public for only a brief time. Long before the lengthy criminal proceeding ends, the offending movie will have finished its run and gone on to other cities. Petitioner always has a remedy in law. The courts are ever concerned with freedoms and liberties wrongfully withheld. They will assuredly protect the petitioner if protection is proper. But, petitioner does not want this. Petitioner seeks to exhibit what it pleases for as long as it likes under the guise of "freedom of speech." It is a one-sided freedom. The duty of the municipality to act in the best interests of its people must also be considered. Petitioner is not the only one proud of liberty and freedom. We, too, have the same genuine desire for such constitutional guarantees. We, too, will fight for their retention. But, they are not absolute.

The sole issue confronting this Court is this: *Is previous restraint of speech unconstitutional per se?* This is the crux of the case. No decision of this Court has so held. No language of this Court, however remote, has so indicated. By way of *obiter dictum* this Court has made many observations, not necessarily related to the issue before the Court, but even here petitioner can find no purposeful, meaningful language. This is not to say that certain members of the Court, past or present, may have been so persuaded.

Near v. *Minnesota* recognized that protection against previous restraint was not absolutely unlimited (283 U. S. 697, 716), and in *Kingsley Books, Inc.* v. *Brown* (1957), 354 U. S. 436, this Court gave its approval to a form of prior restraint (pp. 441-444). In the latter case, this Court distinguished its holding in *Near* by pointing out (p. 445);

> "* * * the difference between *Near* * * * and this case is glaring in fact. * * * Minnesota empowered its courts to enjoin the dissemination of future issues of a

> publication because its past issues had been found offensive. * * * This is the essence of censorship.' * * *"

Thus, in *Kingsley Books, Inc.* v. *Brown*, this Court upheld an injunctive remedy against obscene publications as opposed to the contention that this was a form of unconstitutional "prior censorship of literary product."

In *Kingsley Books* this Court also rejected the argument that (p. 441):

> "* * * something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. *It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range or choice.*" (Italics Ours.)

We sincerely contend that this Court should not limit the City of Chicago in resorting to every available legal weapon it may have to combat obscenity in motion pictures publicly exhibited to all people. We hope that the right to prevent motion pictures leading to riots and breaches of the peace will be secured. We believe that the legislative body of the municipality has endeavored to employ all remedies within its power to meet these evils and we trust that the judiciary will not destroy these remedies or the will of municipal officials to protect individuals from riots and breaches of the peace.

As previously stated, petitioner is not without remedy. Resort to the courts is open to everyone as has been proven time and again in this very field. Yet, the most effective remedy that government may employ is here challenged as being unconstitutional. When we weigh the conse-

quences and the remedies, it is clear that petitioner is legally secure, whatever course is followed.

The excellent publicity and flagrant, boastful advertising that follows litigation of this nature is a matter of common knowledge. If the courts allow the municipal judgment to be overthrown, and if a motion picture is eventually exhibited, its owner benefits tremendously. The converse, unhappily, is not true. If an obscene picture may run its course pending protracted criminal proceedings, the damage is done.

Every nation in history has succumbed to defeat, and oftentimes to oblivion, because of decadence, weakness, a relaxation of moral fiber. If our nation does not remain diligent, it too, may one day enter its decline and eventual fall. When this day comes, it will, in a large measure, be attributable to our becoming decadent.

No one wants us to be puritan, anymore than it is desired to be weak or immoral. Neither the petitioner nor this Court has a more vibrant and dedicated belief in liberty and freedom than these respondents.

What, then, is the answer? It is for this Court to lead the way, for it is with this Court that the ultimate responsibility rests. The Court must adhere to a middle-of-the-road policy—a road that is flanked by two precipices. The one drops off to moral debasement, the other to witch-hunting, thought-strangulation, puritan regimentation. Neither course is for America. This Court must take the helm and lead us—both sides to this controversy—down the middle path where motion pictures will be subject to only such prior restraint as may be necessary to prohibit the obscene, the immoral and those motion pictures which tend to produce a breach of the peace and riots.

CONCLUSION.

We have demonstrated that petitioner seeks an abstract decision with no real controversy or substantial federal question before the Court.

We have shown that free speech is not absolute, but subject to certain well-defined and narrowly-limited exceptions. We have proven that the obscene and words or actions leading to riots or breaches of the peace are not constitutionally protected.

We have further shown that the right of municipalities to protect its citizens from harm includes the remedy here considered.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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